IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KENNETH MECUM,
Petitioner/Appellant,

v.

HON. CARMEN DOLNY, JUSTICE OF THE PEACE,
PIMA COUNTY CONSOLIDATED JUSTICE COURT,
Respondent Judge/Appellee,

and

PIMA COUNTY ATTORNEY,
Real Party in Interest/Appellee.

No. 2 CA-CV 2013-0154
Filed May 30, 2014

Appeal from the Superior Court in Pima County
No. C20134062
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Stephen Paul Barnard, Tucson
Counsel for Petitioner/Appellant

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Real Party in Interest/Appellee

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Appellant Kenneth Mecum appeals from the superior court's ruling declining to accept jurisdiction of his complaint for special action. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the superior court's ruling. *Hornbeck v. Lusk*, 217 Ariz. 581, ¶ 2, 177 P.3d 323, 324 (App. 2008). Mecum was charged with driving under the influence of an intoxicant while impaired to the slightest degree and driving with an alcohol concentration of .08 or more. *See* A.R.S. § 28-1381(A)(1), (2). Before trial in the Pima County Justice Court, he filed a motion to suppress the blood evidence obtained from the night of his arrest and to dismiss the § 28-1381(A)(2) charge. Mecum argued that his consent to the blood draw was not freely and voluntarily given because the implied-consent law, A.R.S. § 28-1321, is coercive. After a hearing, the trial court denied the motion.

¶3 Mecum filed a complaint for special action in the superior court, challenging the trial court's denial of his motion. After a hearing, the superior court issued its ruling in which it "exercise[d] its discretion to decline special-action jurisdiction."

This appeal followed.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1), and Rule 8(a), Ariz. R. P. Spec. Actions.

Discussion

¶4 When a party appeals from a special action initiated in the superior court, this court conducts a bifurcated review. *Bazzanella v. Tucson City Court*, 195 Ariz. 372, ¶ 3, 988 P.2d 157, 159 (App. 1999). If the superior court declined to accept special action jurisdiction, as is the case here, we are limited to reviewing that determination and do not consider the merits of the complaint for special action. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979); *see also Hamilton v. Mun. Court of Mesa*, 163 Ariz. 374, 377, 788 P.2d 107, 110 (App. 1989) (determination whether superior court abused discretion in granting or denying special action relief occurs only if superior court accepts jurisdiction and rules on merits).

¶5 We review a superior court's decision to decline jurisdiction in a special action for an abuse of discretion. *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). An abuse of discretion occurs when the record fails to provide substantial support for the court's decision or the court commits an error of law. *Id.* "Acceptance of special action jurisdiction is highly discretionary." *State ex rel. Romley v. Fields*, 201 Ariz. 321, ¶ 4, 35 P.3d 82, 84 (App. 2001); *Pompa v. Superior Court*, 187 Ariz. 531, 533, 931 P.2d 431, 433 (App. 1997).

¶6 Mecum mistakenly asserts that the superior court "correctly and appropriately accepted special action jurisdiction in this matter." Contrary to Mecum's suggestion, the court's ruling does not address the merits of his claim; rather, it explains why the court "exercise[d] its discretion to decline special-action jurisdiction." Consequently, Mecum does not explain on appeal

[1]Mecum's reply brief was not timely filed and was stricken. *See* Ariz. R. Civ. App. P. 15(a). However, nothing contained therein would have changed the outcome of this appeal.

how the superior court abused its discretion in declining jurisdiction. Nevertheless, we find no abuse of discretion.

¶7 Special action jurisdiction "is appropriate when no 'equally plain, speedy, and adequate remedy by appeal' exists." *Romley*, 201 Ariz. 321, ¶ 4, 35 P.3d at 84, *quoting* Ariz. R. P. Spec. Actions 1(a). "Special actions may not be used as a substitute for an appeal." *Jordan v. Rea*, 221 Ariz. 581, ¶ 8, 212 P.3d 919, 924 (App. 2009). "However, 'where an issue is one of first impression of a purely legal question, is of statewide importance, and is likely to arise again, special action jurisdiction may be warranted.'" *Id.*, *quoting Vo v. Superior Court*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992).

¶8 Here, the superior court concluded that Mecum "may proceed to trial and preserve an appeal on the same grounds he now asserts." We agree. The argument raised in Mecum's motion to suppress may be raised on appeal.[2] *See Lind v. Superior Court*, 191 Ariz. 233, 235-36, 954 P.2d 1058, 1060-61 (App. 1998) ("A petition for special action is not ordinarily an appropriate method of obtaining relief from the denial of a motion to suppress because the remedy by direct appeal is generally adequate."); *State v. Sharp*, 193 Ariz. 414, ¶ 22, 973 P.2d 1171, 1178 (1999) (motion to suppress evidence preserves issue for appeal); *e.g., State v. Aleman*, 210 Ariz. 232, ¶ 2, 109 P.3d 571, 574 (App. 2005) (trial court's denial of defendant's motion to suppress evidence of blood-test results raised and resolved on appeal).

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[2]In his complaint for special action below, Mecum cited *State v. Meza*, 203 Ariz. 50, ¶ 18, 50 P.3d 407, 411-12 (App. 2002), and argued that the denial of his "motion to dismiss" had to be brought by special action. First, Mecum's motion—however it was titled—is not part of our record on appeal. *Cf. Flood Control Dist. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, n.7, 279 P.3d 1191, 1204 n.7 (App. 2012) (we assume missing record supports trial court's ruling). Second, because he does not raise this argument on appeal, we do not address it. *See Dawson v. Withycombe*, 216 Ariz. 84, n.11, 163 P.3d 1034, 1050 n.11 (App. 2007) (argument not raised in opening brief waived on appeal).

¶9 The superior court also noted that special action jurisdiction was not appropriate "to the extent" the argument raised in Mecum's motion had been addressed by prior, binding case law. The court thus seemed to imply that Mecum's argument was not a matter of first impression. But, even assuming Mecum had raised an issue of first impression, whether to accept special action jurisdiction was a "highly discretionary" decision for the superior court. *Romley*, 201 Ariz. 321, ¶ 4, 35 P.3d at 84. Given Mecum's remedy by appeal, we cannot say the court abused its discretion in declining jurisdiction. *See Files*, 200 Ariz. 64, ¶ 2, 22 P.3d at 58.

Disposition

¶10 For the reasons discussed above, we affirm.